United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 76-6150

United States Court of Appeals

FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellee*

v.

LOCAL 14, INTERNATIONAL UNION OF OPERATING ENGINEERS;
LOCAL 15, INTERNATIONAL UNION OF OPERATING ENGINEERS;
ET AL., *Defendants-Appellants*

B P/S

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR APPELLANT LOCAL 15

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT LOCAL 15

The Government's brief on appeal does nothing more than track EEOC's proposed findings of fact, with their unique view of the evidence, submitted in the District Court (Record Item 90), and adopted almost verbatim by the trial judge.*/ Accordingly, since our Opening Brief demonstrates that these findings were erroneous,

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*/ EEOC does not even attempt to dispute the fact that the trial court mechanically adopted the opinion, findings and proposed judgment submitted by the Government (Opening Brief at 4, 39). Likewise, it expresses no disagreement with our showing that in such circumstances, the findings are not entitled to the weight customarily accorded them under the "clearly erroneous" standard (Id., 25-26)

because they lack support in the record, Local 15 need not reargue these points and this Reply Brief will not be extended.

However, it is extremely important to correct the substantial distortions of the record which characterize EEOC's statement of facts and argument (EEOC Brief at 8-15, 28-33), regarding the alleged pattern and practice of discrimination. Simply stated, EEOC in its brief attempts to show a pattern of treating white and minority individuals differently in various areas of union activities. Such a pattern does not exist, and where EEOC uses transcript references to support its statements, those references often fail to contain what EEOC says they do.*/

One example clearly illustrates EEOC's typical approach. After stating that "white nonunion persons usually gained membership in the union by getting a job through the local's hiring hall * * * and being brought into the union under the collective bargaining agreements" (EEOC Brief at 8-9)**/, the Government brief contrasts

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*/ In some cases, EEOC will also cite support for its position from the District Court's findings (App. I, pp. 70-127). Those findings, in turn, were taken from the EEOC's proposal, where the most important conclusions are set forth without record support. Thus, by laundering its unsupported trial court proposals through the District Judge's findings, EEOC reasserts them as entitled to the dignity of "findings". Thus we are told, for example, that New York City is the appropriate statistical area because "as the district court found, only 180 of Local 15's more than 6,000 members * * * worked outside New York City. (App. I 125)." The truth is that the District Court made no such finding. See App. I 125.

**/ EEOC cites for this statement, in addition to the trial findings and some inapposite collective bargaining agreements, five transcript references, pp. 78, 120-122, 243, 343, 363-364 (EEOC Brief at 9). None of these references include any discussion of the race of those who obtained jobs and then Local 15 membership in this way, and none of them even hint that blacks did not come in under this method. Furthermore, a number of the black witnesses for Local 15 testified that they secured a position and joined the union in the way that EEOC suggests was used only by whites.

this with the treatment it supposes minorities receive: Local 15 "refer[s] minority persons seeking work from or membership in Local 15 to the [training] school * * *" (EEOC Brief at 10). Several transcript citations are then provided, i.e., Tr. 106, 120, 288, 315, 3122-3124, 3132, 3172, 3589, in an attempt to support this description of apparent discrimination.

Most of the testimony cited contains no discussion of race; and there are several instances where the witness unambiguously states that anyone would be sent to the school to "take the test" (Tr. 120). But on two occasions witnesses were specifically asked whether whites and minorities were both sent out to the school.

First, Thomas Maguire, Jr., was asked what would happen if the person seeking work "wasn't minority" (Tr. 287). Maguire replied that the union would "request that he be tested at our training school * * *" (Tr. 288). Second, Daniel Murphy was asked whether he had "had any white applicants", and when he indicated yes, was asked "what do you do with them?" (Tr. 3121). He replied that Local 15 "test[s] them the same way. We give them the same test * * *" (Ibid.). Finally, Mr. Murphy added that whites had been tested and put on the school's waiting list, and that this was done for "both black and white" (Tr. 3122).

It is clear, in other words, that careful and close examination of EEOC's claims of disparate treatment reveals that in the area of opportunities for working, there is in fact no discrimination. The same thing is true in testing, admission to the union, and referral procedures.*/ We discuss these areas below, in part

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*/ Indeed, the District Court expressly found "no credible evidence of deliberate discrimination in the referral procedures over recent years" (App. I, pp. 90-91).

2 of the Reply Brief, following our response to EEOC's contention that a prima facie case of discrimination was shown through statistics. The Reply Brief concludes by demonstrating that the relief imposed by the judgment is unnecessary and inconsistent with Title VII.*/

1. EEOC Failed to Establish a Statistical Case.

We explained in our Opening Brief that the District Court erred in its use of statistics in two, mutually reinforcing, ways. First, it selected the wrong union figures when it focused on union membership, rather than minority admissions since the effective date of Title VII. Second, it selected the wrong population figures when it limited itself to New York City, rather than looking at the figures for the metropolitan area where union members lived and worked. Our position was that a comparison of the percentage of minorities admitted to the union since 1965 to the percentages of minorities in the area where union members lived and worked, demonstrated no statistical imbalance.

EEOC does not, in any way, question the statistics underlying our position; indeed, it notes that our "figures do show an increased percentage of minority admissions" since the Act went into effect. But it does disagree with both aspects of our approach in

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*/ This arrangement allows the Reply Brief to deal with the issues in the same order they are presented in both EEOC's and Local 15's briefs. More importantly, if--as we contend in the first point--there was no statistical disparity between admissions and the relevant population, much of EEOC's argument on a pattern of discrimination falls. The argument was really designed to show that the disparity was caused by discriminatory conduct; if there is no such disparity, the practices to which EEOC objects can be seen as they are, non-discriminatory in purpose and effect.

the area.*/

On the first point, EEOC has very little to argue. Both the legislative history of Title VII (Opening Brief at 29), and any number of decisions construing it, e.g., Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), confirm that the statute is prospective in operation only. So "[n]o one can quarrel with the broad proposition that Title VII operates only prospectively." Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980, 987 (5th Cir. 1969).

This means that Title VII "does not provide a remedy for acts of discrimination which occurred prior to July 2, 1965." Lorillard, supra, at 795; Dobbins v. Local 212, International Brotherhood of Electrical Workers, 292 F. Supp. 413, 443 (W.D. Ohio 1968). Accordingly,

> Pre-Act discrimination does not furnish the basis for any relief under Title VII [Citations omitted]. The pattern or practice based on which a successful Title VII action may be maintained must be shown to have been one which existed or took place after, and not before July 2, 1965.

Ibid. In sum, "[O]nly a post-Act practice or pattern may furnish the basis for a Title VII claim * * *." Ibid.

In accord with these principles, it is proper to focus not on the total percentage of minorities in an employer's or a union's workforce, but rather on the treatment of minorities since the Act became effective. Parham v. Southwest Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970); Patterson v. American Tobacco Co.,

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*/ EEOC gratuitously (and, as it happens, inaccurately) states that Local 15 "presented no evidence at trial of alternative statistics" (EEOC Brief at 25). The only such evidence from any of the parties was the Department of Commerce Census Figures for 1970, a Government Exhibit. But all the parties used it, and Local 15

 (fn. cont.)

535 F. 2d 257 (4th Cir. 1976). Thus, in Parham, where the evidence showed compliance with Title VII by the late 1960's, an injunction against discrimination was denied.*/

The issue was squarely raised in Patterson, where the Court concluded that the defendant's

> conduct before the effective date of Title VII does not provide a proper base to measure its compliance with the Act; instead, it must be judged by the manner in which it filled vacancies after this date.

535 F. 2d at 274. For these reasons and those set forth in our Opening Brief, it is abundantly clear that the proper approach is to evaluate the percentage of minority admittees since the Act went into effect.

EEOC apparently accepts this position, in effect, because its only argument in favor of looking at the membership percentage is that this is more significant "for purposes of considering the discriminatory effects of various union practices" (EEOC Brief at 27).**/ This circular reasoning is completely unpersuasive especially since EEOC gives no reasons why counting the membership percentage is more significant.

On the second half of Local 15's approach, that the entire

(fn. cont.) argued from those statistics that a prima facie case had not been made out(Record Item 93, p. 6).

*/ The employer in Parham was found to be violating the Act, though no injunction issued, because his discriminatory conducted continued for a period after the Act became effective.

**/ EEOC also argues that our approach is wrong because even the higher admission figures are below the New York City workforce figures. We show, infra, that the City is not the relevant geographic area.

metropolitan area's minority workforce statistics be considered, EEOC advances three arguments. It contends that the workforce to be compared should be that residing in the City, because (1) other courts have done this, (2) the District Court found only 180 members of Local 15C work outside the city, and (3) minority workers are concentrated in the City. None of these arguments are persuasive.

First, even in those decisions choosing to consider the area as being limited by the union's jurisdiction, there is no discussion of other approaches. Simply because these courts once applied an approach favored by EEOC without briefing on the issue hardly shows they accept the position. Moreover, a number of recent decisions, including a decision cited by EEOC, hold that the area beyond the City must be considered because workers live there.

In that case, Rios v. Enterprise Assn. Steamfitters Local 638, 400 F. Supp. 938 (S.D.N.Y. 1975), the court rejected EEOC's effort to narrow the geographical market. The court stated:

> The Court rejects plantiffs' contentions that the percentage goal should reflect the location of work within the union's jurisdiction. In the context of the steamfitting industry, the assumption that workers would not travel outside their county of residence seems unwarranted.

400 F. Supp. at 988. This position is analagous to our argument that confining the market to the City assumes that everyone who works in New York lives there, a fact obviously untrue.

Very recently, the Eighth Circuit was faced with determining the relevant labor market area in a Title VII case. United States

v. Hazelwood School District, 534 F.2d 805 (1976). The Court selected the metropolitan area, rather than the central city, pointing out that the "relevant labor market area is that area from which the employer draws its employees", 534 F.2d at 810 n. 7, and that of these employees, "approximately 80 percent resided in St. Louis City and County * * *." Ibid. In other words, the labor market area is the one where the employee resides, not where he works.

Here, Local 15's survey of PX 98, the listing of its membership, showed that approximately one-half of a random sample (247/543) lived outside the city. Therefore, the District Court erred in limiting the statistics to New York City, when members lived outside the city in the surrounding counties that constitute a labor market from which Local 15 takes its members.

Second, EEOC argues that the District Court found as a fact that only 180 members of the union worked outside the city, a minimal number not justifying utilization of suburban statistics. However, as pointed out above, p. 2 fn., the Court made no such finding. Indeed, it could not, since the record shows that Locals 15B-D all perform outside the city itself. In any event, location of residence, not work alone, creates the relevant market.

Finally, EEOC states that the City should be used for comparison purposes because "minority workers * * * tend to be concentrated there." In other words, EEOC is saying that a party is obligated to take as his market the fullest concentration of minorities, and then have his employees measured against this. We see little merit in any such biased approach.*/

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*/ EEOC also includes a few arguments against looking at a (fn. cont.)

2. The Government Failed to Prove A Pattern and Practice of Favoring Whites Over Minorities.

In its brief, as we have noted, EEOC continually describes instances of favoritism in various union activities, when in fact there is no record support for EEOC's belief. To the contrary, we showed in our Opening Brief that in the areas of recruitment, training, work referral and union admission policies, there was no disparity between the treatment accorded whites and minorities. The testimony of the minority union men in Local 15 fully established this.

a. Access to Jobs.

It is important to emphasize, first, that the statistical material presented above (and in our Opening Brief) belies any discrimination in union admission. Since the most common way to join the union was through obtaining work and coming in under a collective bargaining agreement, as EEOC itself contends, it follows that if minorities are being admitted to the Local in proportion to their numbers in the relevant workforce, they must also be obtaining jobs at comparable rates. Certainly there was no evidence presented at the trial to contradict this assumption.

Moreover, there is nothing inherently discriminatory in word-of-mouth referrals, to which EEOC takes such objection, unless this results in denying jobs to minorities out of proportion to their numbers. As the Ninth Circuit pointed out in Taylor v. Safeway Stores, Inc., 524 F. 2d 263, 272 (1975), after finding

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(fn. cont.) segment of the population other than unskilled labor for comparison with Local 15 admission figures. While these arguments are not at all compelling, the fact is that even the minority unskilled population in the metropolitan area is well below the Local's post-Title VII admission figures.

that the percentage of minority hires exceeded minorities in the workforce:

> even though the hiring at the distribution center relied heavily on employee referrals, * * * we must sustain the district court's finding that the employee referral system was not a violation of Title VII.

Here, EEOC speaks of the "severe disadvantage"(Brief at 30) minorities suffered under such referrals, the fact is that the testimony was to the contrary. Black witnesses testified to their ability to find work independently, and then join the union.

b. Training.

We referred earlier to the fact that EEOC's statement that whites and minorities received different responses from the union when they sought training is flatly contradicted by the record. See above, pp. 2-3. It is simply untrue that "stricter requirements were applied almost exclusively to minorities" (EEOC Brief at 30).*/

Nor is it accurate to state that few white applicants take the tests, because only twenty whites joined the union by graduating from school between 1972 and 1974 (App. I, p. 87). How many individuals graduate from the school hardly measures how many are tested and passed the tests. Besides, the percentage of minorities entering the union from the school was comparable to the percentage of minorities in the workforce.

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*/ EEOC also attacks the union testing as not being job-related because, it says, those who had not yet qualified were still sent out on jobs. Local 15's minority witnesses made it clear that they were sent out to operate machines they could handle while they learned on ones they could not. And the only testimony on the point made it clear that requiring ability on several machines enhanced the ability of the individual to find work.

c. Admission.

EEOC is considerably off the mark in suggesting that there was "active, contemporary discrimination" against minorities by Local 15 because of the training program. The fact is that EEOC simply cannot show that minorities were treated any differently in connection with the program. Again, EEOC's own witnesses were predominantly union members who had gained admission in various ways, including training at the school.

It is a bit ludicrous to characterize Local 15 as being similar to other unions (EEOC Brief at 31-32), where the practices there involved included cramming children of members to pass court-imposed exams. There was no evidence that any different admission standards were applied to minorities, i.e., upon graduation from the school any individual was admitted to the union.

Likewise, there is no basis for EEOC's scattered assertions that whites were preferred for jobs, and thus more easily got the experience necessary to qualify for journeyman status. Finally, there is certainly nothing improper about admitting to membership journeymen transfers from other Engineer locals.*/

d. Referral Hall.

While conceding that the District Court found that there was no discrimination in operating the hiring hall, and in the face of its own witnesses' testimony that everyone is sent out on the

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*/ EEOC is disturbed by the fact that a journeyman operating engineer from another local might be admitted without testing, while Local 15 generally tested individuals from other training plans, including the Army's. We pointed out in our Opening Brief the testimony of several Army-trained engineers who conceded they needed more training. The same was true of EEO-trained graduates.

"same basis" (Tr. 841, 1241), EEOC seeks to argue that minorities waited longer in the referral hall to be sent out (EEOC Brief at 32). There simply is no evidence which will support this. To the contrary, a number of minority witnesses testified that they had been referred out ahead of whites, and had worked for substantial periods of time.

Moreover, it bears repeating that something less than 30 percent of the union members even used the referral hall. Local 15 can hardly be operating a discriminatory program relating to jobs when comparatively few of the jobs are even found through the union.

e. Affirmative Action Programs.

EEOC takes Local 15 to task because its many affirmative action programs, in EEOC's view, are not completely successful (EEOC Brief at 32-33). The fact is that Local 15 exceeded its goals considerably under the New York plan (See DX G). Likewise, the director of the RTP program praised the Local's efforts. And whatever the deficiencies of the training school, the evidence was overwhelming that it was extremely valuable in preparing men for union membership.

Apparently, EEOC's concern is that the trainees were not receiving everything the journeymen did, or were receiving tangible rewards from their training at a slower rate. EEOC complains that trainees under the New York Plan must go through a three-year program, while similarly inexperienced newcomers (white) come in as members. This is another example of EEOC's insistence, totally without record support, that unskilled people can enter the union and perform as operating engineers. A quick view of a construction site is enough to dispell this sort of non-sense.

3. The Inappropriateness of the Relief Ordered.

In our Opening Brief we stated that Section 706(g) of Title VII granted broad equitable power to a court for the purpose of redressing any discriminatory employment practices found to exist. However, as we pointed out, the nature of that power is such that any remedial order must be tailored to fit the violations found. We then demonstrated that the relief ordered by the District Court in this case went far beyond that necessary to redress the alleged discriminatory practices which it purported to find. (Brief at 43-44)

In its response EEOC does not deny the correctness of our formulation of Title VII relief principles. Rather, it attempts to rebutt our argument, that the court violated these principles, by seriously distorting, indeed misstating, the record evidence. Simply stated, EEOC creates findings and evidence of "long-standing, flagrant discrimination" where none exist, and are not substantiated in any manner by the record, in order to justify the harsh overreaching of the District Court. (EEOC Brief at 45)*/

The most blatant misstatement of the facts is found in EEOC's attempted justification for the court-ordered work referral system. That portion of the Court's order (1) abolished the right of all workers to find their own jobs with contractors; (2) prohibited contractors from hiring new workers directly and from recalling prior employees; and (3) terminated an employees job whenever he was laid off for more than three days. The new system imposed an

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*/ It is perhaps more appropriate to say that EEOC is seeking to justify its own overreaching since, as we pointed out in our Opening Brief, the trial court's order was almost verbatim that proposed to it by EEOC. (Brief at 39)

exclusive hiring hall on the industry. Now all workers and all contractors are required to use the union's work referral system in order to establish employment relationships.

EEOC says this relief is "central to eradicating the long-standing advantages of the overwhelming white membership of both unions gained as a result of past discrimination." (EEOC Brief at 38) The "advantages," EEOC argues, reside in the fact that in the past "union members have sought and obtained work directly from contractors" whereas "non-union minorities have been generally foreclosed from acquiring work contact with contractors." (EEOC Brief at 38-39)

Leaving aside the illogic in now requiring all workers to go through a hiring hall rather than allowing all workers, union and non-union, to find their own employment with contractors, the record directly contradicts EEOC's purported statement of the facts. The evidence demonstrates that all workers -- minority, non-minority, union, and non-union -- have always been free to seek jobs directly from contractors and in fact have done so.*/ Thus, the purported justification does not exist.

We have pointed out other misstatements by EEOC in the earlier portions of this Brief, and do not repeat them here. Suffice to say that such distortions cannot sustain the relief granted.

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*/ At least three minority witnesses testified that prior to their becoming members of Local 15 they obtained jobs on their own with union contractors. (Tr 3283; 3304: 3315) As we pointed out in our Opening Brief this is the most common way in which the union gets new members. Workers find jobs and they become union members. (Brief at 11)

Remedies which must be tailored to Title VII violations cannot be justified where the violations are made out of whole cloth.

Instead, at this point we turn to an analysis of certain legal principles which, standing independent of record considerations, require this Court to invalidate the order of the District Court regarding work referral and membership quotas.

First, it is well-settled that victims of discrimination are entitled to relief which will, so far as possible, put them in their "rightful place" within an employment relationship. However, such relief cannot, consistent with Title VII, provide for "bumping" or displacement of incumbent employees in order to open employment opportunities for past victims of discrimination. See e.g., EEOC v. Sheetmetal Workers Local 28, 532 F.2d 821, 830 (2d Cir. 1976); Patterson v. American Tobacco, 535 F.2d 257, 267 (4th Cir. 1976); Local 189 United Papermakers v. United States, 416 F.2d 980, 988 (5th Cir. 1969); Cf Kirkland v. Department of Corrections, 520 F.2d 420, 429 (2d Cir. 1975). The rationale behind the principle is found in the need to reconcile the rights of discriminatees with those of innocent employees who have done no wrong, but who may have benefited from an unlawful system. Patterson v. American Tobacco, supra, at 268.*/

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*/ As Patterson points out, this rationale is consistent with the legislative history of Title VII. Proponents of the Act stated unequivocally that the legislation was not intended to be used to displace incumbent workers. The bill's sponsers, Senators Clark and Case, stated that an employer "would not be obliged - or indeed, permitted - to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." Patterson v. American Tobacco, supra, at 268, n.7.

In practice, this means that alleged discriminatees, purportedly foreclosed from various job opportunities in the past, are entitled to such opportunities when they arise in the normal course of business. As jobs open, rights to them vest. However, absent vacancies, there is no entitlement that would allow displacement of incumbent employees.

The trial court here violated this principle when in conjunction with creating the exclusive hiring hall it decreed that all workers on lay-off from their employers for more than three days would be considered terminated. They could not go back to their jobs. Rather, the jobs would be filled through referrals from the hiring hall.

Placed in its industry context, the Court will create vacancies by its own fiat and then fill them through referrals from the hiring hall in order to provide minorities with "work contacts with contractors."

The evil in this system is, obviously, the three day rule which displaces incumbent employees. Heretofore, a worker's job did not terminate if he was on temporary lay-off for more than three days. Because of the cyclical nature of construction, it was quite common for employees to be on lay-off several times during a year, but their employment relationships were never considered at an end during these periods. When weather improved, or another phase of a job started, or a new project began, an employee started work again for his employer. He never lost his job and was not required to go to the union for referral to another

employer.

EEOC blithely contends that this court-ordered change in industry practices does not constitute bumping but is filling "future vacancies . . . on a non-discriminatory basis." (EEOC Brief at 40) In doing so it ignores the fact that the vacancies occur only by reason of the court's order. They do not result from the normal course of business as stated in United States v. Bethlehem Steel, 446 F.2d 652, 666 (2d Cir. 1971), upon which EEOC purports to rely.

Lest there be any doubt that these Court created vacancies are not true vacancies and that impermissable bumping has been ordered, a consideration of this Court's decision in Williamson v. Bethlehem Steel, 468 F.2d 1201 (2d Cir. 1972) puts it to rest. In Williamson the black plantiffs sought to enjoin the recall of laid-off employees because they alleged it would be done on a racially discriminatory basis. The plantiffs argued that employees should be called back on the basis of plantwide seniority, rather than departmental seniority, since blacks had been discriminatorily limited to certain departments of the plant. Thus, upon recall the plantiffs wanted opportunities to get into departments from which they had been excluded unlawfully.

The company and the union argued, in effect, that the use of plantwide seniority for recall purposes would constitute bumping since blacks could move into jobs they had never held before. They would thereby have preference over whites who were on lay-off from those very jobs and who had return rights to them.

This Court remanded the case back to the District Court with instructions to consider how long a lay-off must be before it was no longer temporary. That determination would then dictate one of two possible conclusions. If the lay-off was temporary the displacement of those with prior rights to the jobs in question would constitute impermissable bumping. If the lay-off was extended displacement would be permissable.

Of particular interest here was this Court's direction to the lower court to consider whether the requirement (contained in the company's collective bargaining agreement) that an employee be on lay-off for six months or more before he could exercise his plant-wide seniority to "bump" was an unreasonable amount of time. Ibid at 1205.

While a six month period may require pause for consideration as to whether a lay-off is temporary or extended, surely one cannot reasonably conclude that a three day lay-off is anything other than temporary. Since it is, the relief ordered here clearly consitutes the sort of "bumping" prohibited by the Act.

Turning now to a consideration of the trial court's imposition of a 36% minority membership quota, an analysis of this Court's "quota decisions" requires reversal of this part of the order also.

We have stated previously that, in our view, Title VII prohibits the imposition of membership quotas. At the same time, we conceded that certain decisions of this Court have sanctioned

their use in limited circumstances. (Opening Brief at 41-42). Due to the "discrimination inherent in a quota system" this Court has approached their use in a "gingerly" fashion. Kirkland v. Department of Corrections, 520 F.2d 420,427, (2d Cir. 1975).

In its most recent treatment of the matter the Court summarized the issue:

> The underlying considerations behind an order such as that on appeal are easy to state, if difficult to reconcile. When dealing with recalcitrant unions which have defied gentler means of enforcement, a mathematical membership goal may be viewed as the only effective means to eradicate discriminatory practices and to remedy the effects of past discrimination. On the other hand, the use of such membership goals means, in practice, that certain non-minority persons will be kept out of the defendant union solely on account of their race or ethnic background. Such "reverse discrimination" contradicts our basic assumption that individuals are to be judged as individuals, not as members of particular racial groups.

EEOC v. Sheetmetal workers Local 28, 532 F.2d 821, 827 (2d Cir. 1976).

It then went on to state the following formula:

> . . . the imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of "reverse discrimination" will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons.

Ibid at 828.

In the present case EEOC seeks to bring the lower courts order within this stated formula by asserting that "in this case the long-standing, flagrant discrimination can hardly be doubted." (Brief at 45). As we have pointed out there is no record support for such hyperbole. That fact alone is enough to require reversal.

However, there is a further reason requiring invalidation of the 36% membership quota. Sheetmetal Workers Local 28 teaches that an admission quota is not acceptable where objective, non-discriminatory standards for admission are being implemented. Thus, this Court disapproved establishment of a ratio of white to minority acceptances into Local 28's apprenticeship program. To utilize a quota would be inconsistent with the court-ordered administration of admittedly neutral, non-discriminatory apprentice entrance tests approved by EEOC. Simply stated, a quota which purports to be a remedial device to overcome past discriminatory admission practices becomes unnecessary when new non-discriminatory standards are put into effect. 532 F.2d at 831. See also Kirkland v. Department of Corrections, supra, at 428.

In our case we have this same situation. In one part of its order the trial court established non-discriminatory membership standards which Local 15 is mandated to apply to all minority applicants. (App. I, p. 247). But it did not stop there. It went on to require a 36% membership quota which is, of course, inconsistent with the notion of non-discriminatory standards. It is one thing to fill openings on a quota basis in the absence of non-discriminatory standards for doing so. But it makes no sense to create fair, objective standards and at the same time impose a quota. By failing to recognize this the lower court overstepped the bounds for quota relief established by this Court.

CONCLUSION

For the foregoing reasons, as well as those set forth in our Opening Brief, the judgments of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief for Appellate Local 15 was mailed, postage prepaid, to counsel for all the parties this 10th day of December, 1976.

William D. Appler

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